Office Supreme Court, U. S.
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In the Supreme Court of the United States

No. 1061

RICARDO SANTANA,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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No.

RICARDO SANTANA,

PETITIONER,

UNITED STATES OF AMERICA,

RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Ricardo Santana prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the First Circuit, entered in the above entitled case on March 31, 1964.

Citations to Opinions Below

The opinion of the United States District Court for the District of Puerto Rico is printed in the certified copy of the record, appendices and proceedings, R. 5; and is reported at 216 F. Supp. 631. The judgment is printed at R. 7. The opinion and judgment of the United States Court of Appeals are printed in the certified copy of the record appendices

and proceedings, R. 41 and 45, and in the appendix annexed hereto, however they are not yet officially reported.

Jurisdiction

The judgment of the United States Court of Appeals was entered on March 31, 1964. The jurisdiction of this Court is invoked under 28 U.S.C.A. Section 1254, (1). June 25, 1948, C. 646, 62 Stat. 928.

Questions Presented

1) Whether Congress can authorize or has authorized the Post Office Department to search and seize other than first class mail without obtaining a search warrant?

2) Where a statute authorizes postal inspection of other than first class mail for the purpose of determining whether the proper amount of postage has been applied, may the Postmaster General issue a Postal Manual regulation authorizing unlimited search and seizure of other than first class mail?

3) As the only statutory basis for postal inspection of other than first class mail is to determine whether the proper rate of postage has been collected and where it is admitted that the cause of inspection and seizure by postal officials of petitioner's parcel was other than postage, is the inspection and seizure contrary to the Constitution, and must a motion to suppress be granted?

4) May the constitutional rights provided by the Fourth Amendment be overridden by the application of ultra-technical postal statutes and regulations?

5) Where postal inspection of other than first class mail is authorized by statute as a means of determining whether the proper rate of postage has been applied, may this pro-

cedure be utilized as a means of acquiring evidence to be used against the sender in a criminal prosecution?

Statutes Involved

United States Constitution Amendment 4 – Searches And Seizures.—

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

5 U.S.C. Section 1008—Imposition of sanctions; determination of applications for licenses; suspension, revocation, and expiration of licenses—

> In the exercise of any power or authority—
>
> (a) No sanction shall be imposed or substantive rule or order be issued except within jurisdiction delegated to the agency and as authorized by law.
>
> (b) In any case in which application is made for a license required by law the agency, with due regard to the rights or privileges of all the interested parties or adversely affected persons and with reasonable dispatch, shall set and complete any proceedings required to be conducted pursuant to sections 1006 and 1007 of this title or other proceedings required by law and shall make its decision. Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, no withdrawal, suspension, revocation, or

annulment of any license shall be lawful unless, prior to the institution of agency proceedings therefor, facts or conduct which may warrant such action shall have been called to the attention of the licensee by the agency in writing and the licensee shall have been accorded opportunity to demonstrate or achieve compliance with all lawful requirements. In any case in which the licensee has, in accordance with agency rules, made timely and sufficient application for a renewal or a new license, no license with reference to any activity of a continuing nature shall expire until such application shall have been finally determined by the agency. June 11, 1946, c. 324, Sec. 9, 60 Stat. 242.

39 U.S.C., Section 4058—Wrapping matter not charged with first class postage.

(a) The Postmaster General may prescribe the manner of wrapping and securing mail not charged with first class postage so that the contents of the mail may be easily examined. He shall charge the first class rate of postage on all matter which cannot be examined easily.

(b) To ascertain whether the proper rate of postage has been paid, postmasters may examine second class mail and remove the wrappers and envelopes from other mail not bearing first class postage if it can be done without destroying them. Pub. L. 86-682, Sept. 2, 1960, 74 Stat. 657.

39 U.S.C., Section 4001 (footnote notice)—

In order to alert the recipients of mail and the general public to the fact that large quantities of obscene, lewd, lascivious, and indecent matter are being intro-

duced into this country from abroad and disseminated in the United States by means of the United States mails, the Postmaster General shall publicize such fact (1) by appropriate notices posted in post offices and (2) by notifying recipients of mail, whenever he deems it appropriate, in order to carry out the purposes of this section that the United States mails may contain such obscene, lewd, lascivious, or indecent matter. Any person may file a written request with his local post office to detain obscene, lewd, lascivious, or indecent matter addressed to him, and the Postmaster General shall detain and dispose of such matter for such period as the request is in effect. The Postmaster General shall permit the return of mail containing obscene, lewd, lascivious, or indecent matter to local post offices without cost to the recipient thereof. Nothing in this section shall be deemed to authorize the Postmaster General to open, inspect, or censor any mail except on specific request by the addressee thereof. The Postmaster General is authorized to prescribe such regulations as he may deem appropriate to carry out the purposes of this section. Pub. L. 87-793, Sec. 307, Oct. 11, 1962, 76 Stat. 841.

Postal Manual—831.11 Confidential Treatment of Mail.

11. Opening for Inspection. Do not break, or permit to be broken, the seal of first-class mail or open unsealed first-class letters or parcels while in the custody of the Postal Service, unless you are employed for that purpose in a dead letter branch or a dead parcel post branch. You must observe this rule always, even though you know the letter contains unmailable matter, criminal matter, or evidence for the conviction of a crime. Mail other than first class may be opened for

postal inspection, except official mail weighing more than 4 pounds. (See 137.151).

Statement

The petitioner was convicted of having deposited lottery tickets in the mail in violation of 18 USCA, Section 1302. The essential facts are not in dispute. On January 27, 1961 the petitioner presented a package wrapped in paper and tied with a string at the parcel post window of the United States Post Office, Bayamon, Puerto Rico, and asked the clerk on duty to compute the necessary postage to forward the package to the addressee in New York City via air mail special delivery and insured. The clerk did so, and petitioner paid $2.94 for air mail stamps, $.45 for special delivery and $.20 for insurance, making a total of $3.56. After the postage was applied and the petitioner had departed, the postal clerk, being under the impression, for some unknown reason, that the package contained perishable meat delicacies, took it over to his superior, the superintendent of mails, who removed the string, opened the paper wrapping and found the lottery tickets and copies of a local newspaper.

Upon the trial, petitioner's counsel made a motion to suppress the use of any material obtained as the result of the examination and seizure of petitioner's parcel without a search warrant. Also, it was stipulated by counsel, with the approval of the court, that the jury be dismissed and if the motion to suppress was granted the petitioner would be acquitted, but if the motion be denied, he should be found guilty.

The District Court determined that *Ex-Parte Jackson* (1877) 96 U.S. 727, 24 L. Ed. 877, fully governed the matter at issue. The facts are similar, in that the defendant in that case was charged with having deposited lottery

tickets in the mail. Upon conviction the defendant filed a petition for a writ of habeas corpus and certiorari before this Court alleging he had been deprived of his Constitutional rights under the Fourth Amendment. This Court ruled that the protection provided by the Fourth Amendment does not extend to permit the use of the mails to transport lotteries. The District Court also found that under the postal regulations in evidence (without citing any specific regulation) the parcel was clearly open to inspection. The motion to suppress was denied and the petitioner was convicted.

The Court below affirmed the judgment of the District Court upon the grounds that the parcel was other than first class mail, and Postal Manual Regulation 311.11 authorized the opening for postal inspection of other than first class mail, except official mail weighing more than four pounds.

By reason of the rate of postage paid and the weight of the parcel it was classified air parcel post which could be first-, second-, third- or fourth-class mail. The Court determined, however, that the parcel was other than first class mail as it was insured and only second-, third- and fourth-class mail could be insured.

Reasons for Granting the Writ

The decision of the Court below is in conflict with Congressional legislation and decisions of this Court. The principal question is whether Congress can authorize or has authorized the Post Office Department to search and seize other than first class mail without obtaining a search warrant?

Though the Court below is of the opinion that the question was answered in the affirmative in *Ex-parte Jackson*, 96 U.S. 727, 24 L. Ed. 877, a consideration of recent opinions of this Court discloses otherwise.

In *Manual Enterprises v. Day*, 370 U.S. 478, 8 L. Ed. 2d 639, 82 S. Ct. 1432, Brennan, J. (concurring opinion) with whom Warren, Ch. J. and Douglas, J., join, states in a footnote:

> "Congress in 1865 was undoubtedly against any power in the Post Office to break seals (see Cong. Globe, 38th Cong. 2d Sess. 660-661), and 23 years later made this explicit as to first class mail. 25 Stat. 496-497. But even that was a prohibition "out of abundant caution" and was not intended to imply any power to open mail of other classes. See 19 Cong. Rec. 8189 (1888)." p. 503.

Also, in a dissenting opinion in *Sunshine Book Company v. Summerfield*, 249 F.2d 114, 120, 101 App. D.C. 358, summarily reversed 355 U.S. 372, 2 L. Ed. 2d 352, 78 S. Ct. 365, Washington, J., with whom Edgerton, Ch. J. and Bazelon, J., join, noted:

> "In the first place, it is not at all clear that the Post Office Department possesses any power to censor any class of mail, sealed or unsealed. Certainly Congress has never given such a power in so many words, nor has the Supreme Court ever expressly recognized the existence of such a power."

The reliance of the Court below upon *Ex Parte Jackson*, supra, appears unwarranted in view of the critical references by members of this Court to this opinion. *Roth v. United States*, 354 U.S. 476, 505, 1 L. Ed. 2d 1498, 1518, 77 S. Ct. 1304, Harlan J. (dissenting opinion) (footnote); cited with approval, *Manual Enterprises v. Day*, 370 U.S. 478, 504, 8 L. Ed. 2d 639, 656, 82 S. Ct. 1432, Brennan J. (concurring opinion).

The finding that the Post Office Department does possess the right to search and seize other than first class mail without obtaining a search warrant is also in conflict with legislation. Pub. L. 87-793, Section 307, October 11, 1962, 76 Stat. 841 (39 U.S. Section 4001, note). In this statute Congress attempted to provide procedures that would discourage the forwarding of obscene matter through the mail. However, the statute specifies that nothing therein could be deemed to authorize the Postmaster General to open, inspect, or censor any mail except on the specific request of the addressee.

Another expression of Congressional intent to keep the mails free from surveillance of any form is bill S.2627, introduced on March 11, 1964, Cong. Rec. 8009, (1964). This proposed legislation would prohibit "mail covers".

An additional reason for the granting of this Petition is the substantial importance of the Constitutional issues presented herein. This Court, in its recent decisions, has consistently emphasized the necessity of not allowing restrictions of either a judicial or legislative nature upon the protection provided by the Fourth Amendment. *Mapp* v. *Ohio*, 367 U.S. 643, 6 L. Ed. 2d 1081, 81 S.Ct. 1684; *Stanet* v. *California*, No. 209, October Term, 1963, not yet officially reported, decided March 23, 1964; *Preston* v. *United States*, No. 163, October Term, 1963, not yet officially reported, decided March 23, 1964. The constitutional questions presented by this Petition also directly concern the Fourth Amendment and the extent, if at all, to which its protection may be restricted.

This court has previously recognized the limited authority of the Post Office Department to exercise any form of censorship. *Manual Enterprises* v. *Day*, supra; *Roth* v. *United States*, supra. In granting certiorari in those cases the Court has indicated it will review a finding by the

Court below that the Post Office Department has the authority to supersede the Constitution and its amendments.

The decisions of the Court below in addition to being in conflict with decisions of this Court on the aforenoted issues, is also in conflict as to the authority of the Postmaster General to issue a regulation, Postal Manual Regulation 311.11, that provides for unlimited postal inspection, while the only statutory basis for inspection is to determine whether the proper rate of postage has been applied, 39 U.S.C. Section 4058(b), Pub. L. 86 682, Sept. 2, 1960, 34 Stat. 657. The Post Office Department in respect to the promulgation of regulations is subject to the Administrative Procedure Act, 60 Stat. 237, 5 U.S.C., Section 1001 et seq.; *Standard v. Olesen*, 98 L. Ed. 1151. The determination of the Court below is in conflict with 5 U.S.C., Section 1008(a), June 11, 1946, c. 324, section 9, 60 Stat. 242, and the decisions of this Court that a regulation must be consistent with a statute. *Manhattan G.-E. Co. v. Comm. of Int. Rev.*, 297 U.S. 129, 80 L. Ed. 528. *United States v. Whitney Land Company*, 324 F.2d 33, 38 (CCA 8, 1963).

Respectfully submitted,

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Appendix

United States Court of Appeals
For the First Circuit

No. 6185.

RICARDO SANTANA,

DEFENDANT, APPELLANT,

v.

UNITED STATES OF AMERICA,

APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO.

[216 F. Supp. 631]

Before WOODBURY, *Chief Judge*, and MARIS* and ALDRICH, *Circuit Judges*.

Joseph T. Wynne, with whom *Francisco Ponsa Feliu* was on brief, for appellant.

Benicio Sanchez Rivera, Assistant U. S. Attorney, with whom *Francisco A. Gil, Jr.*, United States Attorney, was on brief, for appellee.

OPINION OF THE COURT.

March 31, 1964.

WOODBURY, *Chief Judge*. The only question on this appeal from a judgment of conviction and sentence for depositing lottery tickets in the mail in violation of Title 18 U.S.C. § 1302 is whether a package, mailed by the appellant and found on inspection by the postmaster at the place of mailing to contain 55 tickets of the lottery of Puerto Rico, was subject to opening and inspection without a search warrant.

*By special designation

The facts of the mailing are undisputed. On January 27, 1961, the defendant appellant presented a package wrapped in paper and tied with a string weighing between three and four pounds at the parcel post window of the United States Post Office, Bayamon, Puerto Rico, and asked the postal clerk on duty to compute the necessary postage to forward the package to the addressee in New York City via air mail, special delivery and insured. The clerk did so, and the defendant paid $2.91 for air mail stamps, $.45 for special delivery and $.20 for insurance, making a total of $3.56. The clerk testified that he gave the defendant a receipt showing the postage paid, the insurance fee, the special delivery fee, the postmark of the post office and the date. After the postage was applied and the defendant had left, the postal clerk, being under the impression for some unknown reason that the package contained non-mailable meat delicacies, took it to his superior, the superintendent of mails, who removed the string, opened the paper wrapping and found the lottery tickets and copies of a local newspaper.

It was stipulated on motion to suppress made by leave of court at the trial that if the search of the package and the seizure of the lottery tickets were unlawful, the defendant should be acquitted, but if the search and seizure were legal, he should be found guilty. The court found the search and seizure legal and entered the judgment of sentence appealed from.

Whether the search was legal depends upon whether the parcel was first-class mail, for Title 28 U.S.C. § 4057 [1] provides: "Only an employee opening dead mail by authority of the Postmaster General, or a person holding a search warrant authorized by law may open any letter or parcel of the first class which is in the custody of the Depart-

[1] Section references hereinafter are to Title 39 U.S. Code as it stood at the time of the mailing.

ment." Whereas Postal Manual Regulation 311.11 provides: "Mail other than first class mail may be opened for postal inspection, except official mail weighing more than four pounds."

To resolve the question whether the package was first class or other than first class we turn to the statute and Title 29 of the Code of Federal Regulations, C.F.R. hereinafter, as it read when the package was mailed.

The package was clearly "air parcel post" and as such might be of any class, for § 4301.2 reads: "'air parcel post' means domestic air mail of any class weighing in excess of eight ounces." The amount of postage paid, $2.91, does not indicate the class of the package, for the reason that § 4303.d provided the same rate of postage on all air parcel post from Puerto Rico to New York. Nor does the amount paid for special delivery, $.40, aid in classifying the package, for that was the flat fee fixed by the Postmaster General pursuant to § 501 for special delivery of air parcel post weighing more than two but less than ten pounds. 39 C.F.R. 56.2.

The fact that the package was insured but not registered, however, shows its proper classification. This is for the reason that while § 5001 permits the Postmaster General to make provision for indemnifying senders or owners of registered articles for loss, rifling or damage in the mails as part of the registry system, § 5006 authorizes the Postmaster General to provide for indemnification by insurance only for articles sent by third or fourth class mail. Since there is no authority for insuring unregistered mail of the first class, we conclude that the package was not first class but must have been accepted as either third or fourth class mail.

Since the appellant might have protected the privacy of his package by marking it first class, see 39 C.F.R. 25.7, in which event he could not insure it, or by registering his

package if in addition to privacy he also wanted insurance protection, we see no constitutional question under the unreasonable search and seizure provision of the Fourth Amendment. See *Ex parte Jackson*, 96 U.S. 727 (1877).

We find no need to discuss the appellant's contention that the package was "sealed" and therefore must be accorded the privilege of secrecy afforded to first-class mail, except to say, first, that merely covering a package with paper and tying it with a string appears to be the minimum wrapping appropriate for any class of mailing, and second, that sealing does not automatically provide first-class protection because, although C.F.R. 25.7 provides that fourth-class mail must be wrapped so that it may be easily examined, it also provides: "Mailing of sealed parcels at the fourth-class rate of postage is deemed to be the consent of the sender to postal inspection of the contents."

Judgment will be entered affirming the judgment of the District Court.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 6185.

RICARDO SANTANA,
DEFENDANT, APPELLANT,

v.

UNITED STATES OF AMERICA,
APPELLEE.

JUDGMENT

March 31, 1964

This cause came on to be heard on appeal from the United States District Court for the District of Puerto Rico, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By the Court:
(s) ROGER A. STINCHFIELD,
Clerk.

[cc: Messrs. WYNN and SANCHEZ RIVERA.]